

AMENDED IN ASSEMBLY MAY 7, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 1218

Introduced by Assembly Member Dutra

February 21, 2003

An act to amend Section 25299.57 of, and to add Article 6.5 (commencing with Section 25299.64) to Chapter 6.75 of Division 20 of, the Health and Safety Code, relating to underground storage tanks.

LEGISLATIVE COUNSEL'S DIGEST

AB 1218, as amended, Dutra. Underground storage tanks: claims: performance based contracts.

Under the existing Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989, owners and operators of petroleum underground storage tanks requires every owner of an underground storage tank to pay a storage fee for each gallon of petroleum placed in the tank. The fees are required to be deposited in the Underground Storage Tank Cleanup Fund. The money in the fund may be expended by the State Water Resources Control Board, upon appropriation by the Legislature, for various purposes, including the payment of claims to aid owners and operators of petroleum underground storage tanks who take corrective action to clean up unauthorized releases from those tanks.

This bill would authorize the board to pay a claim to reimburse the cost of a performance based contract, as defined, for corrective action that is approved by the board. The bill would require a performance based contract to include specified terms and would require the board

to make payments under a performance based contract based upon the actual reduction of contamination of the site.

The bill would require the board to monitor the bidding for a performance based contract and would require the board to be the receiving address for sealed performance based contract bids. ~~The bill would require the board to expedite the review of any claimant utilizing a performance based contract in determining whether to pay a claim.~~ The board would be required to adopt regulations to implement the bill.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 25299.57 of the Health and Safety Code
2 is amended to read:
3 25299.57. (a) If the board makes the determination specified
4 in subdivision (d), the board may only pay for the costs of a
5 corrective action that exceeds the level of financial responsibility
6 required to be obtained pursuant to Section 25299.32, but not more
7 than one million five hundred thousand dollars (\$1,500,000) for
8 each occurrence. In the case of an owner or operator who, as of
9 January 1, 1988, was required to perform corrective action, who
10 initiated that corrective action in accordance with Division 7
11 (commencing with Section 13000) of the Water Code or Chapter
12 6.7 (commencing with Section 25280), and who is undertaking the
13 corrective action in compliance with waste discharge
14 requirements or other orders issued pursuant to Division 7
15 (commencing with Section 13000) of the Water Code or Chapter
16 6.7 (commencing with Section 25280), the owner or operator may
17 apply to the board for satisfaction of a claim filed pursuant to this
18 article. The board shall notify claimants applying for satisfaction
19 of claims from the fund of eligibility for reimbursement in a
20 prompt and timely manner and that a letter of credit or
21 commitment that will obligate funds for reimbursement shall
22 follow the notice of eligibility as soon thereafter as possible.
23 (b) (1) For claims eligible for reimbursement pursuant to
24 subdivision (c) of Section 25299.55, the claimant shall submit the
25 actual cost of corrective action to the board, which shall either
26 approve or disapprove the costs incurred as reasonable and
27 necessary. At least 15 days before the board proposes to

1 disapprove the reimbursement of corrective action costs that have
2 been incurred on the grounds that the costs were unreasonable or
3 unnecessary, the board shall issue a notice advising the claimant
4 and the lead agency of the proposed disallowance, to allow review
5 and comment.

6 (2) The board shall not reject any actual costs of corrective
7 action in a claim solely on the basis that the invoices submitted fail
8 to sufficiently detail the actual costs incurred, if all of the
9 following ~~applies~~ *apply*:

10 (A) Auxiliary documentation is provided that documents to the
11 board's satisfaction that the invoice is for necessary corrective
12 action work.

13 (B) The costs of corrective action work in the claim are
14 reasonably commensurate with similar corrective action work
15 performed during the same time period covered by the invoice for
16 which reimbursement is sought.

17 (C) The invoices include a brief description of the work
18 performed, the date that the work was performed, the vendor, and
19 the amount.

20 (c) (1) For claims eligible for prepayment pursuant to
21 subdivision (c) of Section 25299.55, the claimant shall submit the
22 estimated cost of the corrective action to the board, which shall
23 approve or disapprove the reasonableness of the cost estimate.

24 (2) If the claim is for a performance based contract, the board
25 shall comply with Article 6.5 (commencing with Section
26 25299.64) and shall pay the claim in accordance with that article.

27 (d) Except as provided in subdivision (j), a claim specified in
28 subdivision (a) may be paid if the board makes all of the following
29 findings:

30 (1) There has been an unauthorized release of petroleum into
31 the environment from an underground storage tank.

32 (2) The claimant is required to undertake or contract for
33 corrective action pursuant to Section 25296.10, or, as of January
34 1, 1988, the claimant has initiated corrective action in accordance
35 with Division 7 (commencing with Section 13000) of the Water
36 Code.

37 (3) (A) Except as provided in subparagraph (B), the claimant
38 has complied with Section 25299.31 and the permit requirements
39 of Chapter 6.7 (commencing with Section 25280).

1 (B) All claimants who file their claim on or after January 1,
2 1994, and all claimants who filed their claim prior to that date but
3 are not eligible for a waiver of the permit requirement pursuant to
4 board regulations in effect on the date of the filing of the claim, and
5 who did not obtain or apply for any permit required by subdivision
6 (a) of Section 25284 by January 1, 1990, shall be subject to
7 subparagraph (A) regardless of the reason or reasons that the
8 permit was not obtained or applied for. However, on and after
9 January 1, 1994, the board may waive the provisions of
10 subparagraph (A) as a condition for payment from the fund if the
11 board finds all of the following:

12 (i) The claimant was unaware of the permit requirement prior
13 to January 1, 1990, and there was no intent to intentionally avoid
14 the permit requirement or the fees associated with the permit.

15 (ii) Prior to submittal of the application to the fund, the
16 claimant has complied with Section 25299.31 and has obtained
17 and paid for all permits currently required by this paragraph.

18 (iii) Prior to submittal of the application to the fund, the
19 claimant has paid all fees, interest, and penalties imposed pursuant
20 to Article 5 (commencing with Section 25299.40) and Part 26
21 (commencing with Section 50101) of Division 2 of the Revenue
22 and Taxation Code for the underground storage tank that is the
23 subject of the claim.

24 (C) (i) A claimant exempted pursuant to subparagraph (B)
25 shall obtain a level of financial responsibility twice as great as the
26 amount which the claimant is otherwise required to obtain
27 pursuant to subdivision (a) of Section 25299.32.

28 (ii) The board may waive the requirements of clause (i) if the
29 claimant can demonstrate that the conditions specified in clauses
30 (i) to (iii), inclusive, of subparagraph (B) were satisfied prior to the
31 causing of any contamination. That demonstration may be made
32 through a certification issued by the permitting agency based on
33 site and tank tests at the time of permit application or in any other
34 manner acceptable to the board.

35 (D) The board shall rank all claims resubmitted pursuant to
36 subparagraph (B) lower than all claims filed before January 1,
37 1994, within their respective priority classes specified in
38 subdivision (b) of Section 25299.52.



1 (4) The board has approved either the costs incurred for the
2 corrective action pursuant to subdivision (b) or the estimated costs
3 for corrective action pursuant to subdivision (c).

4 (5) The claimant has paid all fees, interest, and penalties
5 imposed pursuant to Article 5 (commencing with Section
6 29299.40) and Part 26 (commencing with Section 50101) of
7 Division 2 of the Revenue and Taxation Code for the underground
8 storage tank that is the subject of the claim.

9 (e) The board shall provide the claimant, whose cost estimate
10 has been approved, a letter of credit authorizing payment of the
11 costs from the fund.

12 (f) The claimant may submit a request for partial payment to
13 cover the costs of corrective action performed in stages, as
14 approved by the board.

15 (g) (1) Any claimant who submits a claim for payment to the
16 board shall submit multiple bids for prospective costs as
17 prescribed in regulations adopted by the board pursuant to Section
18 25299.77.

19 (2) Any claimant who submits a claim to the board for the
20 payment of professional engineering and geologic work shall
21 submit multiple proposals and fee estimates, as required by the
22 regulations adopted by the board pursuant to Section 25299.77.
23 The claimant's selection of the provider of these services is not
24 required to be based on the lowest estimated fee, if the fee estimate
25 conforms with the range of acceptable costs established by the
26 board.

27 (3) Any claimant who submits a claim for payment to the board
28 for remediation construction contracting work shall submit
29 multiple bids, as required in the regulations adopted by the board
30 pursuant to Section 25299.77.

31 (4) Paragraphs (1), (2), and (3) do not apply to a tank owned or
32 operated by a public agency if the prospective costs are for private
33 professional services within the meaning of Chapter 10
34 (commencing with Section 4525) of Division 5 of Title 1 of the
35 Government Code and those services are procured in accordance
36 with the requirements of that chapter.

37 (h) The board shall provide, upon the request of a claimant,
38 assistance to the claimant in the selection of contractors retained
39 by the claimant to conduct reimbursable work related to corrective
40 actions. The board shall develop a summary of expected costs for

1 common remedial actions. This summary of expected costs may
2 be used by claimants as a guide in the selection and supervision of
3 consultants and contractors.

4 (i) The board shall pay, within 60 days from the date of receipt
5 of an invoice of expenditures, all costs specified in the work plan
6 developed pursuant to Section 25296.10, and all costs that are
7 otherwise necessary to comply with an order issued by a local,
8 state, or federal agency.

9 (j) (1) The board shall pay a claim of not more than three
10 thousand dollars (\$3,000) per occurrence for regulatory technical
11 assistance to an owner or operator who is otherwise eligible for
12 reimbursement under this chapter.

13 (2) For the purposes of this subdivision, regulatory technical
14 assistance is limited to assistance from a person, other than the
15 claimant, in the preparation and submission of a claim to the fund.
16 Regulatory technical assistance does not include assistance in
17 connection with proceedings under Section 25296.40,
18 25299.39.2, or 25299.56 or any action in court.

19 (k) (1) Notwithstanding any other provision of this section, the
20 board shall pay a claim for the costs of corrective action to a person
21 who owns property on which is located a release from a petroleum
22 underground storage tank that has been the subject of a completed
23 corrective action and for which additional corrective action is
24 required because of additionally discovered contamination from
25 the previous release, only if the person who carried out the earlier
26 and completed corrective action was eligible for, and applied for,
27 reimbursement pursuant to subdivision (b), and only to the extent
28 that the amount of reimbursement for the earlier corrective action
29 did not exceed the amount of reimbursement authorized by
30 subdivision (a). Reimbursement to a claimant on a reopened site
31 shall occur when funds are available, and reimbursement
32 commitment shall be made ahead of any new letters of
33 commitment to be issued, as of the date of the reopening of the
34 claim, if funding has occurred on the original claim, in which case
35 funding shall occur at the time it would have occurred under the
36 original claim.

37 (2) For purposes of this subdivision, a corrective action is
38 completed when the local agency or regional board with
39 jurisdiction over the site or the board issues a closure letter
40 pursuant to subdivision (g) of Section 25296.10.

SEC. 2. Article 6.5 (commencing with Section 25299.64) is added to Chapter 6.75 of Division 20 of the Health and Safety Code, to read:

Article 6.5. Performance Based Contract

25299.64. (a) For purposes of this article, the following definitions shall apply:

(1) "Performance based contract" means a fixed price contract to take a corrective action where payment is made when preestablished cleanup milestones are reached. A performance based contract shall include set milestones, goals, a schedule for completion, and a payment schedule for meeting milestones, goals, and timeframes.

(2) "Contaminant level" means the contaminant level of a release that exists before a corrective action is implemented pursuant to a performance based contract.

(b) The board may pay a claim pursuant to *Section 25299.57* to reimburse the cost of a performance based contract for corrective action that is approved by the board pursuant to this section. A claimant and an appropriately licensed contractor guaranteeing the corrective action shall be the parties to the performance based contract. A claimant shall obtain the approval of the board for all costs before initiating work under a performance based contract.

(c) The terms of a performance based contract shall include, but not be limited to, the total amount to be paid for completion of the corrective action provided for by the contract, corrective action goals, and the negotiated schedule for completion of goals or milestones.

(d) The board shall make payments under a performance based contract based upon the actual reduction of contamination of the site that is subject to the corrective action. For those sites for which the board estimates that corrective action will take more than six months and will require the installation and operation of a mechanical remediation system, the board may make the payments under a performance based contract using a phased payment system, in the following manner:

(1) The first payment shall include the amount of incurred capital costs upon successful installation and startup of the mechanical remediation system.

(2) The second payment shall be an amount equal to the agreed upon percent of the total contract price for the first 25 percent reduction in the contaminant level.

(3) The third payment shall be equal to an agreed upon percent of the total contract price for the next 25 percent reduction in the contaminant level, if there is a total of 50 percent reduction in the contaminant ~~levels~~ level.

(4) The fourth payment shall be equal to an agreed upon percent of the total contract price for the next 25 percent reduction in the contaminant ~~levels~~ level, if there is a total of 75 percent reduction in the contaminant level.

(5) The fifth payment shall be equal to an agreed upon percent of the total contract price for the next 25 percent reduction in the contaminant level, if there is a total of 100 percent reduction in the contaminant level.

(6) The final payment shall be the amount of the remaining contract price to be paid one year after the completion of the corrective action, if the site is in compliance with the preliminary active remediation goal established in the contract.

25299.65. (a) An owner or operator shall submit multiple bids for a performance based contract in accordance with paragraph (1) of subdivision (g) of Section 25299.57 and any regulations adopted by the board to implement that section.

(b) To assist claimants in soliciting the minimum bids and receiving adequate bids, the board shall monitor the bidding for a performance based contract, and all performance based contracts shall be advertised through the board's Web site. The board shall be the receiving address for sealed performance based contract bids. This subdivision does not prevent the board from approving a performance based contract covering multisite cleanups, if the board determines that economies of scale will assist in soliciting bids or reducing overall costs.

(c) In approving a site for corrective action under a performance based contract, the board shall consider the following site conditions as the best candidates for a performance based contract:

(1) A site that has been open, in that the site has been reported as ~~a~~ an unauthorized release to the board, the regional board, or local agency for five or more years, and either corrective action has

1 not begun or initiated corrective action has failed to significantly
2 reduce constituents of concern.

3 (2) A site that has been the subject of an approved active
4 corrective action for two or more years and contamination levels
5 have failed to decline significantly, or are reaching asymptotic
6 levels and closure is not imminent within two years.

7 (3) A site where corrective action is nearing the maximum fund
8 reimbursement amount, or continued corrective action is expected
9 to exceed maximum reimbursements prior to case closure.

10 (4) A new site that has the potential to impact nearby receptors
11 or otherwise cause significant impact to the waters of the state.

12 (5) A site that has released MTBE, as defined in Section
13 25299.97, into groundwater and has not initiated corrective action
14 within a reasonable timeframe after site assessment, or any high
15 priority MTBE site that has not initiated satisfactory corrective
16 action as determined by the board or local agency, or according to
17 any regulations adopted pursuant to Section 25296.30.

18 (6) A monitoring-only site where corrective action under a
19 performance based contract can be completed sooner and at a
20 lower cost than continued monitoring.

21 (d) This article does not prohibit a claimant from voluntarily
22 entering into a performance based contract.

23 ~~(e) The board shall expedite the review of a claimant utilizing~~
24 ~~a performance based contract in determining whether to pay a~~
25 ~~claim pursuant to Section 25299.57.~~

26 25299.66. The board shall adopt regulations to implement
27 this article pursuant to Section 25299.77.